



REPUBLIC OF KENYA

IN THE HIGHCOURT OF KENYA

COMMERCIAL, ADMIRALTY AND TAX DIVISION

CIVIL CASE NUMBER 298 OF 2012

MIDAS TOUCH INVESTMENT LTD.....PLAINTIFF

VERSUS

PRIMECOM COMMUNICATIONS LTD.....DEFENDANT

JUDGMENT

1. The Plaintiff commenced this suit vide a Plaint dated 28th June 2010, amended on 15th September 2010 and filed on 16th September 2010, seeking for judgment against the Defendant in the sum of Kshs 18, 916,000.00, interest thereon, The Plaintiff also seeks for the costs of the suit and interest thereon at court rates and any other relief that the Honourable court may deem fit to grant.

2. It is the Plaintiff's case that, it leased premises known as Land Reference Number 209/65/32 (herein "the suit premises") from Gersau Ltd, for a period of 12 years with effect from, 1st May 2009 and took possession thereof. Subsequently with the permission of the landlord and based on the letter of offer dated 10th September 2009, the Plaintiff sub-let the suit premises to the Defendant for a period of six (6) years; with effect from 1st October 2009.

3. That the letter of offer provided inter alia that:-

a. The rent payable was Kshs 2,552,000.00;

b. The Defendant was to pay security deposit equivalent to initial quarterly rent being Kshs 6,600,000.00;

c. The rent was payable monthly in advance within the first seven (7) days of the months;

d. If rent remained unpaid for fourteen (14), days, it would amount of breach of contract; and

e. Interest on any rent overdue would be calculated at the rate equivalent to the lending rate of Diamond Trust Bank of Kenya.

4. That based on the above terms, the total initial amount payable was Kshs 9,152,000.00. Upon taking possession of the premises, the Defendant allegedly made a payment of Kshs 1, 500, 000.00. It also issued two cheques, dated 1st and 31st October 2009, for a sum of Kshs 2,784,000.00 and 5,500,000.00 respectively, to clear the arrears. However, the cheques could not be paid due to the Central Bank of Kenya guidelines on payment of sums above Kshs 1,000,000.00 and had to be paid through electronic transfer.

5. The Plaintiff further avers that subsequently, the Defendant without its knowledge and consent created a sub-lease in favour of Murza Rashid t/a Hungama and Restaurant and when the Plaintiff attempted to terminate the tenancy with the Defendant, Murza Rashid instituted proceedings vide the Business Premises Rent Tribunal Number, 1095 of 2009. As a result the Plaintiff and the Defendant were restrained from terminating the lease and/or levying for distress. The current tenant in occupation Mr Murza Rashid then executed a new lease with the owner of the property. To mitigate the loss, the Plaintiff relinquished the suit premises with effect from May 2010.

6. However the Plaintiff still claims the sum herein of Kshs, 18,916,000.00 being rent for the period October 2009 to May, 2010. That despite the demand, the Defendant has refused and/or neglected to pay hence the suit.

7. The Defendant on 8th September 2010, filed a statement of defence dated 7th September 2010, denying the Plaintiff's claim, save to concede that it made a payment of Kshs 1, 500,000.00 and issued the two aforesaid cheques. That having made the payment and issued with the keys to the suit premises, extensive inspection thereof was carried out and it was discovered that the building had cracks, there was no water and the electrical fittings were in poor state.

8. Further the Defendant learnt from the neighbours that there was a legal dispute over the premises. However, that despite demand that the Plaintiff deals with these issues, nothing was done including proof of legal ownership of the premises through production of the title deed. Therefore the Plaintiff fraudulently represented themselves as the owners of the premises.

9. The Defendant averred that subsequently, in the month of December 2009, it informed the Plaintiff that, it was not interested in sub leasing the premises and returned the keys. Therefore the Defendant is not liable to pay the sum claimed and has never promised to pay it.

10. That even then, the Plaintiff cannot demand rent on the basis of a lease agreement that was “never entered into, executed, stamped and registered”. It was further averred that, the Plaintiff was aware of the tenancy with Murza Rashid t/a Hungama & Restaurant.

11. The Plaintiff filed a Reply to the Defence dated 25th October, 2010, basically rebutting the averments in the statement of defence and argued that, the terms of letter of offer and acceptance thereof, constituted a valid agreement between the parties. That, it provided for inters alia, payment of security deposit, which was the basis of forwarding the lease agreement.

12. That the Defendant inspected the premises, made payment and issued cheques and even let the premises to a third party. Therefore the Defendant cannot say the premise was in poor state. The Plaintiff denied prior knowledge of the sub lease of the premises to the third party by the Defendant.

13. At the hearing of the case, the Plaintiff called one witness; Mr Gurdeep Singh Chana who relied on the witness statement dated, 17th February 2017, and reiterated the averments in the Plaint. However he stated that, at all material times, he was a director of the Plaintiff’s company and represented it in the transaction with the Defendant and the Defendant was represented by one Zakir Rayani, who negotiated and signed all documents on behalf of the Defendant.

14. The Defendant did not call any witness at the trial. At the close of the trial the parties then filed their respective submissions. I have considered the entire case, in the light of the pleadings and the evidence adduced alongside the submissions filed. I note that despite the fact that the Defendant did not call any witness to support its defence and/or rebut the evidence adduced by the plaintiff, it has raised several factual issues in its submissions. The question is whether the Court can deal with them in the absence of oral evidence to support the defence.

15. The law is settled that, the plaintiff always has the primary role to discharge the legal burden of proof in order to succeed in its case, (see *Britestone Pte Ltd v Smith & Associates Far East, Ltd [2007] 4 SLR(R) 855 at [59]*). In the same vein, section 107 of the Evidence Act (cap 80 Laws of Kenya) states that:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist;

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”.

16. Thus, the burden of proof lies on the party who asserts that certain facts exist. However, the burden on the Defendant depends on the kind of defence filed, where the defence is a mere denial, there is strictly speaking no legal burden of proof. In that case the defence is not putting forth a legal defence to avoid or defeat the claim; neither is it asserting a positive case. It only seeks to ensure that the Plaintiff fails to prove its case.

17. The other kind of defence is where the Defendant asserts a fact either to explain away any of the factual assertions of the Plaintiff or to give a different version of the facts that is favourable to the Defendant. In such an event, the burden to prove its case or discharge the burden simpliciter; (See *Wee Yue Chew v Su Sh-Hsyu[2008] 3 SLR(R) 212, especially at [7] where the plaintiff claimed the purchase price was RMB2.5m, but the defendant asserted it was US\$508,069. Thus the burden of proof on the plaintiff was to prove RMB2.5m; the legal burden of proof on the defendant was to prove US\$508,069*). Thus, the first form of defence has as its sole objective to ensure the Plaintiff’s case fails, and the second form of defence has as part of its objective, to ensure that the plaintiff fails to discharge its burden of proof.

18. Finally the third form of defence is in the form of an avoidance of the claim, essentially a defence whereby, if the defendant were to succeed, he would be able to defeat the plaintiff’s claim even if the plaintiff has proved its claim on a balance of probabilities. This is a typical case where the defendant has the “burden to prove its case”. An example of this would be a case where a plaintiff sues on a contract and a breach thereof, which it succeeds to prove. The Defendant’s defence could be a misrepresentation on the part of the Plaintiff. If the Defendant proves this defence, then notwithstanding the Plaintiff discharging the burden to prove its case, the Defendant would still defeat the Plaintiff’s case upon proving such a defence. (*Cooperatieve Centrale Raiffeisen-Boerenleenbank BA, Singapore Branch v Motorola Electronics Pte Ltd 11(“Rabobank”) Pte Ltd [2011] 2 SLR 63 at [30]; see also Britestone Pte Ltd v Smith & Associates Far East, Ltd [2007] 4 SLR(R) 855.13*)

19. In the instant case although the Defendant did not adduce any evidence, the Defendant in its submissions stated as follows:

“ the Defendant never availed any witnesses during the hearing since the Defendant was of the view that the case was hinged on false misrepresentation and was never a privy to any of the dealings alleged”

20. However, I find that if the Defendant is relying on misrepresentation as a defence to defeat the Plaintiff’s claim, then the Defendant should have adduced evidence of the alleged material misrepresentation. The Defendant cannot turn the submissions into evidence and argue that; that the Plaintiff had no title to the property nor authority to lease the same.

21. The Defendant also alleged that the Plaintiff dealt directly with one Mr Rayani who had no authority to represent the Defendant and that

there the letter of offer was altered there was no formal communication, nor was the alteration sanctioned by the Defendant. As per the Defendants submissions and the authorities cited of; Rosetta Cooper vs Gerald Nevil and Another (1951) EA 63, it is not for the court to speculate on any issue without evidence.

22. The Defendant then went on in its submissions to analyse the Plaintiff's case. The Defendant cannot tear into the Plaintiff's case and/or evidence when it chooses not to testify and accord the Plaintiff an equal opportunity to test the veracity of its pleadings.

23. In my considered opinion therefore, the statement of defence filed herein is not supported and neither has the evidence adduced by the Plaintiff been rebutted.

24. Be that as it were the Defendant raised an issue of law to the effect that, the Plaintiff has sued the wrong party. That, the letter of offer was between the Plaintiff and Sakura Holdings Ltd and not the Defendant. Reliance was placed on the case of; Salomon Co. Ltd vs Salomon 1897 A.C 22, recognises the separate legal personality of a company. The Defendant further submitted that, no certificates of incorporation of the two companies were produced and that it has vehemently denied the authenticity of the letter of offer. Yet again there is no evidence to support these averments.

25. Be that as it were, I find that, first and foremost, if the Defendant believed that it had been improperly sued, it should have raised the issue at the earliest. I have looked at the Defence filed and the Defendant states that it admits the description of the parties as stated in the Plaint. Nowhere does it state that it has been wrongly sued. Secondly, if the Defendant had testified at the trial it should have seized the opportunity to prove in "flesh and blood manner" that it was wrongfully sued.

26. To the contrary the Defendant has responded to the averments in the Plaint indicating that it had knowledge of the matters averred therein, and pleads in the statement of defence at paragraph 4 (c),(e), (f),(h) and (i) that: it signed the letter of offer, paid Kshs 1,500,000, inspected the suit premises, found cracks and informed the Plaintiff. How can the Defendant then plead that it was not privy to any relationship with the Plaintiff and/or is not liable to pay rent on the basis that the lease agreement was "never entered into, executed, stamped and registered".

27. I find that the plea by the Defendant's allegation that it is a total stranger to the Plaintiff is totally unfounded. Even then, it is in evidence that the Defendant sub-leased the premises to a third party who is still in occupation. How could it sub-lease what it did not have?

28. Be that as it may, the Plaintiff remains reliable to prove its claim. In that regard I have considered the evidence adduced and I find that, the Plaintiff produced a letter of offer dated 10th September 2009, through which it alleges that it leased the suit premises to Sakura Holdings Ltd. The letter is signed by representatives of the parties thereto. It indicates the Plaintiff is the Landlord and the Defendant as the Tenant. But I note that the name of; Sakura Holdings Ltd, is cancelled and replaced with the Defendant's. The cancellation is initialled allegedly by Mr Rayani representing the Defendant.

29. Although the Defendant alleges that Mr. Rayani had no authority to sign the said letter on its behalf that allegation is not supported by evidence. There is also evidence vide a letter dated 7th September 2009 that the Plaintiff sought for authority from its Landlord to sub let the premises and authority was granted by the Landlord; Gersau Ltd vide a letter dated 9th September 2009. Although the permission and authority was granted for sub lease to Sakura Holdings Ltd this name changed to the Defendant's name as evidenced by a letter dated 18th September 2009.

30. The plaintiff further produced evidence that the Defendant made a payment of Kshs 1, 500, 000.00 and issued two cheques. It's noteworthy that the cheques are drawn on the personal account of Zakir Rayani. This payment was made pursuant to the letter dated 10th September 2009. The Plaintiff has produced the cheques that were issued to it and which were not honoured. The cheques would not have been issued in the absence of the Letter of offer.

31. The Plaintiff claims for rent due for the month of October 2009 to May 2010 with interest thereon from the month of October 2009 until payment in full. According to clause 5 of the Letter of offer, the rent for the first year was Kshs 80 per square foot plus 16% VAT per month. Clause 3 indicates that the premises comprises of the entire building erected on the suit property and measuring 27,500 square feet. Therefore the rent payable per month within the first one year was Kshs 2,200,000. I note from the Plaint that, the letter of offer indicated that the rent payable was Kshs. 2,552,000 per month, that figure does not tally with the figure I have arrived at and neither is it evident in that letter of offer.

32. I shall be guided by the figure of Kshs. 2,200,000 per month. The Plaintiff claims for rent for a total of 8 months at Kshs2,200,000, rent payable will then be Kshs 17,600,000 plus 16% VAT. Again this is different from the figure claimed in the Plaint of Kshs. 18,916,000.

However, I note that the Plaintiff averred that upon signing the Letter of Offer the Defendant paid a sum of Kshs 1,500,000 presumably this was deposit for rent. That letter is dated 10th September 2009 and the rent claimed herein is for the month commencing October 2009. If this assessment is correct, then that sum should be deducted from the sum claimed as rent for the months of October 2009 to May 2010, that leaves a sum of Kshs 16,100,000. That in my considered opinion that is the sum owing.

33. As regards interest, I find that the letter of offer provides under clause 7 that, the Tenant shall pay interest on any rent or other sum payable under the Lease which is not paid on the due date whether formally demanded or not. The interest will be calculated from the date on which the rent or other sum is due to the date of payment at the rate same as lending rate of Diamond Trust Bank of Kenya. There is no specific interest provided for.

34. All in all, I am satisfied that the Plaintiff has proved its case on the balance of probability and in the absence of any evidence to the contrary, I enter judgement in favour of the Plaintiff as against the Defendant in the sum of Kshs 16,100,000, costs plus interest at court rate

from the date of filing the suit and the date Judgment of the suit.

35. Those then are the orders of the Court.

Dated, delivered and signed in an open Court this 21st day of February 2019.

G.L.NZIOKA

JUDGE

In the presence of:

Ms. Ilikid for Mr. Khan for the Plaintiff

Mr. Thuku for Ms. Ishi for the Defendant

.....Court Assistant